IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8356 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIDYABEN MANUBHAI AMIN
Versus
BALKRUSHNA RATILAL AND OTHERS

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Appearance :
MR PARTHIV B SHAH for Petitioner.
RULE SERVED BY DS for Respondent Nos. 1 - 2, 4.
DS AFF.NOT FILED (R) for Respondent No.3.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 12/04/2007

ORAL JUDGMENT

1) In this petition, the petitioner original plaintiff has challenged an order dated 6th January, 2006 passed by learned Additional

Senior Civil Judge, Vadodara below Exh.5 in Special Civil Suit No.212/2004 filed by the petitioner herein. Said suit was filed seeking recovery of a sum of Rs.75 Lacs from the opponents herein. Apprehending that the opponents may attempt to fraudulently defeat the decree that may be ultimately passed, the petitioner moved an application Exh.5 before the trial Court seeking attachment before judgment. The petitioner made following two prayers :

(1) That the defendants be directed to jointly and severally give security for the above sum of Rs.75 Lacs.
(2) In case they fail to do so, then immovable property described at Exh.1, namely, a plot situated in City of Vadodara bearing revenue Survey No.117 and 120 of Jetalpur be attached.

2) It is the case of the petitioner that the opponents have attempted to create a situation whereby the decree even if ultimately passed, would not be executed. It is stated that opponent no.3 has already left the country and after the petitioner issued notice dated 11th August, 2003 to the opponents calling upon them to pay the said amount, the said plot was ostensibly transferred by way of sell dated 30th December, 2003. It is contended that the said steps are demonstrative of fraudulent intention on the part of the respondents.

3) Learned Judge in his impugned order turned down the request of the petitioner primarily on the ground that the plot in question was transferred even before the suit was filed.

4) Learned advocate Shri Shah for the petitioner placed heavy reliance on the decision of a Division Bench of the Bombay High Court in case of **SBI Home Finance Limited-appellant Vs. Credential Finance Limited and Others – respondents**,

reported in **AIR 2001 Bombay 179**, in which the Bench was of the opinion that for considering application for attachment before judgment under Order 38 Rule 5 of C.P.C., it is not necessary that the transferees are made parties to the suit when such transfer took place before the suit was filed. It was held that there was no need for the plaintiff to prefer substantive suit for determination of the issue of the fraudulent transfer with a view to defeating the ultimate decree.

4.1) Learned advocate for the petitioner also placed reliance on the provisions contained in Section 53 of the Transfer of Property Act, which reads as follows :

> "53. Fraudulent transfer. - (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee."

5) It may be noted that though served, no one appears for the respondents.

6) Having heard learned advocate for the petitioner and having perused the material on record, I find that the trial Court was not justified in rejecting the application of the petitioner in its entirety. As noted earlier, the petitioner had prayed for twofold reliefs. The first relief was for securing a sum of Rs.75 Lacs by requiring the defendants to give a suitable security. Second prayer was more in the nature of an alternative and the prayer was that in case the defendants fail to provide such security, the plot in question be taken in attachment before judgment.

7) Learned Judge completely failed to take into account the first prayer of the petitioner. I find that there were sufficient grounds made out by the petitioner to grant at least that prayer. The petitioner had established before the trial Court that one of the defendants had left the country and would not be available for execution of decree, if ultimately passed, additionally it was also pointed out that even after issuance of notice by the petitioner, the opponents had sold off immovable property belonging to them.

8) Learned advocate for the petitioner however submitted that the petitioner is interested in pressing the second prayer also since it is doubtful whether the defendants would be in a position to give security for the said sum independently of the said immovable property. He, however, agreed that certain material particulars are required to be brought on record such as the nature of fraudulent transfer, which according to the petitioner has been entered into between the defendants and the purchasers of the said plot. Under the circumstances, I find it proper that issue be reconsidered by the trial Court, after giving an opportunity to the petitioner to place additional material on record, if so desired.

9) In the result, impugned order dated 6th January, 2006 is quashed. The proceedings arising out of Exh.5 application filed by

the petitioner are remanded for fresh consideration, after giving the petitioner an opportunity to produce additional material on record. Such fresh consideration will be expeditious and will be after bearing in mind the observations made in this order herein above.

10) In the result, the petition is disposed of in view of above terms. Rule is made absolute to the aforesaid extent. No costs.

(Akil Kureshi, J.)

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